

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>BETTY REMFRY</b>	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 239,601 & 239,602
<b>STATE OF KANSAS</b>	)	
Respondent	)	
AND	)	
	)	
<b>STATE SELF-INSURANCE FUND</b>	)	
Insurance Carrier	)	

**ORDER**

Claimant appeals from an Award entered by Administrative Law Judge Bryce D. Benedict on November 24, 1999, as amended by the Nunc Pro Tunc dated December 7, 1999. The Appeals Board heard oral argument May 3, 2000.

**APPEARANCES**

Jan Fisher of Topeka, Kansas, appeared on behalf of claimant. Marcia L. Yates of Topeka, Kansas, appeared on behalf of respondent and the State Self-Insurance Fund.

**RECORD AND STIPULATIONS**

The Appeals Board has considered the record and adopted the stipulations listed in the Award.

**ISSUES**

Claimant alleges three accidental injuries in two docketed claims. In Docket No. 239,601, claimant alleges low back injuries on April 15, 1997, and again on March 26, 1998. For the back injury, the ALJ awarded claimant benefits based on 10 percent disability to the whole person, a disability from functional impairment only. The ALJ denied claimant's request for a work disability on the grounds that claimant could have continued to earn a comparable wage but chose, for reasons other than the injury, to retire.

In Docket No. 239,602, claimant alleges she injured both upper extremities as a result of the work she did for respondent through the last day she worked, December 11, 1998. On this claim, the ALJ found claimant failed to prove the work caused any injury and denied benefits. Claimant's contention is the opposite extreme. Claimant contends this injury has caused her to be permanently and totally disabled.

Respondent also asks for review of one issue on appeal in the event a work disability is awarded, namely whether respondent is entitled to an offset under K.S.A. 1999 Supp. 44-501(h) for retirement benefits attributable to contributions by the employer. Respondent also asks for an offset for the social security benefits claimant is receiving.

The issues on appeal are, therefore:

1. What is the nature and extent of claimant's disability?
2. Is respondent entitled to an offset for retirement benefits?
3. Whether claimant is entitled to future and unauthorized medical.
4. Claimant also raises and preserves an issue regarding the constitutionality of K.S.A. 44-501(h).

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record and considering the arguments, the Appeals Board concludes the Award should be affirmed.

#### **Findings of Fact**

1. Claimant began working for respondent as a keyboard operator on March 18, 1988. She was promoted to Office Assistant III sometime in 1994 or 1995.
2. Claimant began having problems with her left upper extremities in 1990. Claimant sought medical care and saw, among others, Dr. Sharon L. McKinney. Claimant had trouble doing repetitious arm activity and stated that what hurt the most was holding a pen. Dr. McKinney diagnosed fibromyalgia and osteoarthritis. She sent claimant for therapy.
3. Claimant saw Dr. McKinney again in 1994. At this time, claimant was having problems with her hands, arms, shoulders, and hips. Dr. McKinney made the same diagnosis she had in 1990, fibromyalgia and osteoarthritis, and concluded the two conditions had become worse. Dr. McKinney prescribed physical therapy for the hands and splints. Claimant wore the splints at work for the remainder of the time she worked for respondent.

4. Claimant injured her low back on April 15, 1997, when she fell off a stool while attempting to return forms to a file cabinet.

5. Claimant injured her back again on March 26, 1998, while attempting to pull a folder out of a file cabinet. Claimant testified this injury caused her back to become worse. For the back injury, claimant first saw her personal physician, then Dr. Robbie E. Logan, and finally was transferred to Dr. Joseph G. Sankoorikal. Claimant received conservative treatment, including injections, a corset, a TENS unit, and medication. Dr. Sankoorikal treated claimant from September 1997 through July 1998.

6. Dr. Sankoorikal saw claimant again in May 1999 for the purpose of evaluating claimant's injuries. He diagnosed degenerative disc disease, bilateral trochanteric bursitis, and osteoarthritis in the wrists and hands. He also noted the history of fibromyalgia. Dr. Sankoorikal rated the new impairment as 9 percent of the whole person. The 9 percent included 3 percent for aggravation of degenerative disc disease and 6 percent for trochanteric bursitis. He did not rate the osteoarthritis or what he called possible tendinitis. When asked whether the osteoarthritis was aggravated, Dr. Sankoorikal testified, "I think there is a good possibility it might happen."<sup>1</sup> He did not consider it likely the work caused the osteoarthritis. In general, Dr. Sankoorikal's opinion regarding what injury was caused by work would indicate that claimant's degenerative disc disease and bursitis were caused or aggravated by the work injuries, but Dr. Sankoorikal gives no opinion to a reasonable degree of medical probability that the osteoarthritis was permanently worsened by claimant's work.

Dr. Sankoorikal considered, but ruled out, carpal tunnel syndrome. He noted the previous diagnosis of fibromyalgia but did not, himself, examine claimant for this condition. Dr. Sankoorikal also did not examine for injury to claimant's shoulders.

7. Dr. McKinney, who treated claimant for upper extremity problems in 1990 and 1994, examined claimant at the request of claimant's counsel in September 1998. Dr. McKinney diagnosed osteoarthritis in the back, hands, and shoulders. Dr. McKinney also considered, but does not ever diagnose, carpal tunnel syndrome. Dr. McKinney had previously diagnosed fibromyalgia and it is apparent from her testimony that Dr. McKinney continues to believe claimant has fibromyalgia because fibromyalgia was part of the reason she eliminated some of the tasks when she gave her opinion about what tasks claimant can no longer perform.

As to the relationship between work and the osteoarthritis, Dr. McKinney's report stated the arthritis was aggravated by the repetitive nature of the work. Dr. McKinney testified that if you do not practice joint protection, the work can cause the condition to come on sooner. She also testified that the fall at work in April 1997 would have, at a minimum,

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<sup>1</sup> Sankoorikal deposition, p. 24

permanently aggravated the osteoarthritis and may have caused more in some joints. Finally, she testified that work that stresses the joints causes increased pain and if you do it over a period of time, the change is permanent.

Dr. McKinney did not give an opinion about the cause of the fibromyalgia.

Dr. McKinney did not rate claimant's impairment.

8. Dr. Edward J. Prostic examined the claimant, also at the request of claimant's counsel, on January 19, 1999. He diagnosed chronic strain and sprain of the low back as well as trigger points at her left sacroiliac joint and both greater trochanters. He also diagnosed carpal tunnel syndrome and osteoarthritis in the upper extremities. He acknowledged that claimant had a negative EMG but still believed she has carpal tunnel syndrome. He suggested she should have injections and splints. If the injections produced relief, surgery should be considered for the carpal tunnel syndrome.

Dr. Prostic separately rated the impairment for claimant's lumbar area and upper extremities. For the lumbar area, he gave a 10 to 12 percent whole person impairment. For the carpal tunnel syndrome, he rated the right side as 10 percent to the extremity or 6 percent of the whole person. The left side he gave a 20 percent rating or 12 percent of the whole person. He combined the upper extremity ratings for a 17 percent of the whole person.

Dr. Prostic stated in his report that he did not consider the osteoarthritis to be work related, and he testified he had not included the osteoarthritis in his ratings.

9. Claimant retired effective December 11, 1998. According to claimant, she retired because of the work-related injuries. She testified that she initially planned to apply for a disability retirement but changed her mind and applied for the regular retirement when told there would be a six-month waiting period before she could receive disability benefits. Claimant did not inform the supervisor, Ms. Joan Scarlett-Bayens, or her team leader, Cathy Cooper, that she intended to retire until shortly before the retirement became effective and after claimant had, through the personnel offices, taken the steps necessary to accomplish the retirement.

10. The Board concludes, based on the testimony of Dr. Sankoorikal, that claimant has not established in this record that she suffers from carpal tunnel syndrome as diagnosed by Dr. Prostic. Dr. Prostic's opinion appears to be an unconfirmed working hypothesis. He opines that if she were given injections and they provided relief, he would be convinced, in spite of a negative EMG, that she has carpal tunnel syndrome and would consider surgery. The injections were never given, and the Board concludes the evidence does not establish more probably than not that she does have carpal tunnel syndrome.

11. A key dispute in this case concerns whether claimant's work and/or the fall in 1997 aggravated the osteoarthritis in claimant's upper extremities and in general whether claimant's upper extremity problems were caused or permanently aggravated by her work. Claimant argues that while the physicians disagree on the diagnosis, they agree she has upper extremity injury caused by work. The Board finds, however, that the preponderance of the credible evidence does not establish that either the fall at work in April 1997 or other work activities caused permanent aggravation of the osteoarthritis in claimant's upper extremities or caused other permanent injury to claimant's upper extremities.

As above explained, the Board has concluded the evidence does not establish that claimant has carpal tunnel syndrome. The physicians agree claimant has osteoarthritis in her hands and perhaps shoulders. But the Board does not believe the record establishes that the osteoarthritis in claimant's upper extremities was either caused or aggravated by work. The physicians agree it was not caused by work. Only the possibility of aggravation is in question. For the reasons explained below, the Board has concluded claimant also has not met her burden in proving permanent aggravation of the osteoarthritis in claimant's upper extremities.

First, Dr. Prostic, who examined claimant at the request of claimant's counsel, states in his report that the osteoarthritis is not work related. As a physician who testifies frequently on behalf of claimants, Dr. Prostic is fully aware that a condition may be considered work related if aggravated by work. He nevertheless simply stated that claimant's osteoarthritis was not work related. Dr. Prostic also did not include the osteoarthritis in his impairment rating.

Dr. Sankoorikal testifies, in reference to aggravation, that there is a good possibility it might happen. He does not give a causation opinion to a reasonable degree of medical probability. And, he does not explain what he means by aggravation. He does not indicate that he means permanent injury.

Only Dr. McKinney provides support for a conclusion that the osteoarthritis was permanently aggravated and the only part of Dr. McKinney's testimony that reaches this level is her testimony that claimant's fall in April 1997 permanently aggravated the osteoarthritis. Her opinions otherwise do not mention permanency. Her report, for example, says the work aggravated the osteoarthritis but says nothing about permanent injury. Other parts of her testimony refer to what can or sometimes does happen but do not tie the possibility to claimant's experience. Dr. McKinney says, for example, that stress on joints can cause pain and the pain can over time become permanent. She does not state this is what happened in claimant's case. Dr. McKinney's testimony and report do appear to reflect an opinion that the fall in April 1997 caused permanent aggravation. The questioner asks whether the fall caused a permanent aggravation and after some clarification about the fact the question related to aggravation, Dr. McKinney answers: "At minimum."

To the extent Dr. McKinney intended to provide an opinion that claimant aggravated the osteoarthritis in her upper extremities when she fell in April 1997, and it appears this was Dr. McKinney's intention, the Board finds the opinion unconvincing. Dr. McKinney's report includes in the description of the fall at work the fact that claimant tried to catch herself: "I believe at the time of the injury she tried to grab the shelf [*sic*] and has had increased problems with using her hands also." This history, ascertained when Dr. McKinney saw claimant approximately a year and a half after the fall, appears significant to the conclusion. But a history of injury to the upper extremities when she fell is not otherwise supported in the record. Claimant testified she tried to catch herself on a metal shelf. She then testifies to injury to her back and she mentions that the next day she hurt from head to toe but she does not specifically mention injury to her hands. Claimant does not testify to an increase of hand symptoms that she relates to the fall. The records of the initial treatment are not in evidence but Dr. Sankoorikal testified that Dr. Logan, one of the early treating physicians, treated primarily the back.

The Board concludes claimant has not proven permanent work-related injury to her upper extremities.

12. Mr. Bud Langston, a rehabilitation consultant, met with claimant and prepared a list of the tasks claimant had done in her work during the fifteen years before the date of accident. Claimant had worked for Meek's and the State of Kansas. The list included nine tasks:

1. keep records for (3) stores and SW Bell contract—use bookkeeping machine
2. post accounts payable/receivable
3. payroll—50-60 employees
4. type letters for the Department of Revenue
5. proofread transcription
6. type letters, memorandums, labels—stuff forms, mail, get supplies from supply room
7. prepare and maintain a list of companies requesting refunds
8. answer incoming calls and route to appropriate person—answer taxpayers' questions
9. filing

Tasks 1, 2, and 3 were while working at Meek's. Tasks 4 and 5 were while claimant worked as a word processor for the State. Tasks 6 to 9 were while claimant worked as an Office Assistant III for the State.

13. Drs. Sankoorikal, McKinney, and Prostic all testified about claimant's ability to perform the tasks listed on the list of tasks prepared by Mr. Langston. The list specifies activities that are part of the tasks on an occasional, frequent, or constant basis. Occasional represents 1/3 of the time, frequent 1/3 to 2/3, and constant 2/3 or more.

Dr. Sankoorikal did not give a specific set of restrictions, but he did testify that each of the tasks involved elements that would cause flare-ups in claimant's symptoms. Most of the tasks required constant finger activity and/or constant sitting, activities Dr. Sankoorikal thought would cause a flare-up of claimant's symptoms from the osteoarthritis.

Dr. McKinney recommended extensive restrictions for injury to claimant's back, shoulders, and hands. Her report describes the restrictions as follows:

Appropriate work restrictions for this lady are pretty extensive and infact [sic] medical retirement would be more appropriate as she is aggravating her condition with at least some of her job tasks. If working she should be allowed to change positions, sit and stretch as needed at least every 15 to 20 minutes. She will need to rest her shoulders and hands with either mild stretching or hanging her arms shaking them type of things every 15 to 20 minutes. She should not be doing any lifting, needs to avoid stooping, bending, and should limit her walking activities at this time. Her desk should be ergonomically correct of proper height so her legs are on the floor and her arms are properly positioned for her keyboard. It should be arranged that she does not have to sit in a twisted position or twist around to do her work. I certainly would keep her off stools putting files on top of shelves. She should not do much walking and should avoid stairs. She should not bend, stoop, squat, reach overhead or pick things up off the floor. She should not carry breakable things as she may drop them.

Dr. McKinney separated the restrictions based on the specific injury. For the back injury, she recommended claimant avoid stooping and bending and limit walking. She recommended an ergonomic desk area, no twisting, avoid stairs, and no squatting or picking things up off the floor. The remainder of the restrictions, including the restriction against lifting, were for the shoulder and hands.

Dr. Prostic stated claimant should avoid lifting more than 25 pounds occasionally and should be able to change positions frequently. For the upper extremities, he recommended she avoid handwriting and keypunching for more than 30 minutes per hour.

Dr. Prostic reviewed Mr. Langston's task list and based on the restrictions to the upper extremities would eliminate all tasks except No. 9 because of the involved constant fingering. Dr. Prostic questioned whether proofreading would require constant fingering but testified that if it did, she could not do the task. Based on restrictions for the back,

Dr. Prostic would eliminate all tasks except No. 6 and No. 9 because all other tasks are shown as requiring constant sitting.

14. Dr. McKinney testified that claimant has osteoarthritis in her back as well as her hands. Although she does not expressly so state, it appears clear Dr. McKinney's restrictions in general included restrictions that would be attributable to her osteoarthritis. Certain of the restrictions are for the upper extremities where claimant has osteoarthritis that the Board had found is not compensable. Dr. McKinney testified the tasks she has said claimant cannot do are eliminated primarily because of the osteoarthritis.

Dr. Prostic does not expressly say he had factored out the osteoarthritis when recommending restrictions. He said he did factor out the osteoarthritis for the rating, but he does not comment on this question for the restrictions. But claimant could perform the tasks she performed for respondent within Dr. Prostic's restrictions for the back injury if she were not required to sit constantly. He testified the weights were within his restrictions.

15. The Board finds Dr. Prostic's restrictions for the back injury to be the most reasonable and appropriate. They appear to be the only restrictions that do not include non-compensable injury.

16. Claimant was moved to a job in registration in the summer of 1998. After claimant was placed in registration work, she did not request any accommodation for her injuries. Respondent had earlier provided some accommodation. Specifically, respondent had provided a footstool, allowed claimant to wear the brace to work, had lowered claimant's work area, and allowed claimant to stand and move around when she needed to. But claimant testified, and nothing in the record suggests otherwise, that it took almost a year and a half before the work area was lowered. Even then, it was lowered only because claimant stopped maintenance personnel and asked for the change. In addition, moving claimant to the work in registration made things worse for her rather than better. It was more difficult for her to stand occasionally as she needed to because she was in the way of others unless she moved completely out of her work area. Claimant also testified that in registration the work was harder, not easier, on her hands. The work arrangement in registration also required that she twist around to reach parts of her work.

### **Conclusions of Law**

1. Claimant has the burden of proving his/her right to an award of compensation and of proving the various conditions on which that right depends. K.S.A. 44-501(a).

2. The Board concludes claimant has 10 percent disability to the body as a whole for accidental injury on April 15, 1997, as aggravated by injury on March 26, 1998. This was the



finding by the ALJ on these injuries. Neither party disputes this finding and it is well supported by testimony and ratings from Dr. Sankoorikal and Dr. Prostic.

3. The Board also finds that claimant failed to prove permanent injury to her upper extremities from either claimant's fall in April 1997 or her repetitive work activities.

4. The Board concludes claimant is not entitled to a work disability award in this case because she has not proven that the compensable work injury was the reason for her retirement. Even if we accept her testimony that her injuries in general were the reason for her retirement, the Board believes that the osteoarthritis and upper extremity injuries were the reason she could not continue. The back injury could, and would, have been accommodated.

Although it is clear that claimant had been moved to a position in registrations, there is some dispute about what claimant's duties were in registrations. The Board concludes that at that time, while she was in registrations, claimant entered information about applicants on screens she pulled up on her computer. She would then stuff envelopes with materials to be mailed to the applicants. The task list prepared by Mr. Langston included similar tasks, but the list did not specifically describe the tasks claimant was doing during the last approximately six months. Ms. Scarlett-Bayens testified claimant could take a break and stretch as needed. Although the Board believes Ms. Scarlett-Bayens was not fully familiar with claimant's duties,<sup>2</sup> the Board also concludes the limited restrictions for claimant's back injury could and would, if they were not already, have been accommodated. This is a relatively minor accommodation and while respondent's record of accommodation was not an exemplary one, the Board accepts as true, at least as to this limited accommodation, testimony that respondent was willing to accommodate restrictions.

In summary, the Board concludes claimant's noncompensable osteoarthritis, not her compensable back injury, was the reason she decided to retire. The back injury alone would have allowed her to continue to work at a comparable wage. Claimant, accordingly, is limited to disability based on functional impairment. K.S.A. 44-510e.

5. Because the Board finds claimant is limited to disability based on functional impairment, the contention that respondent is entitled to an offset for social security and/or KPERS retirement benefits is moot. Even with an offset, the benefits are not to be less than would be provided for the functional impairment. K.S.A. 44-501(h).

6. The fact that claimant has retired does not prevent claiming from receiving work disability benefits. *Graff v. TWA*, 267 Kan. 854, 983 P.2d 258 (1999). But, in our view, the

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<sup>2</sup> Ms. Scarlett-Bayens testified, for example, that claimant spent much of her time dealing with her responsibility for the supply room. Claimant testified, on the other hand, that she was never in charge of the supply room.

fact that the claimant has retired does not automatically entitle the claimant to work disability benefits. The Board acknowledges language in the *Graff* decision that could be read to mean that retirement gives rise to a work disability because the claimant then is not earning 90 percent or more of his/her preinjury wage. But the Board does not believe this is what the *Graff* court intended. The Court went on to find that the claimant in the *Graff* case could not, based on her testimony, return to the work she was doing at the time of the injury. This finding would not be necessary if the claimant automatically became eligible for work disability once he/she retired. The Board concludes that to be awarded a work disability, the claimant must first show that the compensable injury rendered claimant unable to continue with the work she was doing at the time of the injury. In this case, the Board concludes the respondent could, and would, have accommodated the restriction against constant sitting. The compensable injury, therefore, would not have prevented her from continuing in her employment with respondent.

**AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Bryce D. Benedict on November 24, 1999, as amended by the Nunc Pro Tunc dated December 7, 1999, should be, and the same is hereby, affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of June 2000.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Jan Fisher, Topeka, KS  
Marcia L. Yates, Topeka, KS  
Bryce D. Benedict, Administrative Law Judge  
Philip S. Harness, Director